SUPREME COURT, U. S.

JAN 14 1969

JOHN F. DAVIS, CLERK

944

Supreme Court of the United States

JOHN RAYMOND FINCHUM, SR.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR CERTIORARI

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Supreme Court of the United States

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COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

OPINIONS IN COURTS BELOW

There were no written opinions in the courts below.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is a final judgment by the Supreme Court of Appeals of Virginia, dated and entered on the 16th day of October, 1968. which affirmed a conviction of the petitioner for a misdemeanor in the Circuit Court of Prince Edward County, Virginia, pursuant to a trial held on January 17, 1968.

Petitioner seeks reversal of the aforesaid final judgment on the grounds that the Supreme Court of Appeals of Virginia should have reversed the conviction of the petitioner because the petitioner's constitutional rights, specifically the protection against cruel and unusual punishment guaranteed by the Eighth Amendment to the United States

Constitution, and the right to protection against the deprivation of liberty without due process of the law guaranteed by the Fifth Amendment to the United States Constitution, and the right to be protected against an improper search warrant guaranteed in the Fourth Amendment to the United States Constitution, were not protected at his trial to his prejudice. Because the grounds for this petition are based on federal constitutional rights specifically and duly set up and claimed by the petitioner in the courts below and re-asserted here, it is submitted that this Court has jurisdiction to review the final judgment of the Supreme Court of Appeals of Virginia in this case by a writ of certiorari. For this invocation of jurisdiction, petitioner relies upon the statutory provisions of 28 U.S.C. § 1257 (1964), which provides in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> By writ of certiorari
>
> * * *
>
> where any . . . right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

QUESTIONS PRESENTED

1. Can a court punish or impede a petitioner in his effort to appeal a conviction in violation of petitioner's right of due process guaranteed by the Fifth Amendment?

2. Can a court include in its sentencing order a provision for banishment in violation of the petitioner's right of

protection against cruel and unusual punishment under the Eighth Amendment?

3. Can a petitioner be convicted on a warrant that does not properly name him in violation of his right to protection against an improper seizure under the Fourth Amendment?

CONSTITUTIONAL PROVISIONS

Petitioner relies upon the Fourth, Fifth and Eighth Amendments to the United States Constitution which are set forth below in their entirety:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. amend. VIII

STATEMENT OF THE CASE

(A) Material Proceedings in the Lower Courts

On January 17, 1968, a jury trial was held in the Circuit Court of Prince Edward County, Virginia, on the charge against the petitioner of obstructing justice by threats and force.

The petitioner was found guilty as charged and the jury fixed his sentence at six months suspended sentence and $50.00 fine. The jury was instructed by the court to return and reconsider its verdict as only the court could suspend sentence. The jury reconsidered and returned again, eliminating its suspension. (T. 89)*

Defense counsel moved to set the verdict aside and the court set a date for argument on the motion. (T. 95)

On February 29, 1968, the court convened to hear the motion to set aside the verdict but instead, the petitioner's counsel withdrew the motion. (T. 94) The court then asked the Commonwealth for a recommendation and the Commonwealth recommended that four months of the six months sentence be suspended for a period of five years and that the suspension be upon the condition that the petitioner remove himself to the State of Florida for five years. (T. 95, 96)

On March 11, 1968, the petitioner advised the court through his attorney that he wished to discharge his attorney and prosecute an appeal of his case. (T. 99ff)

The court then indicated that if this were done, two companion cases against the petitioner might be reopened (T. 115, 116) and suggested that the petitioner might have waived his right of appeal. (T. 117) The court reempha-

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*T—refers to original trial transcript, a part of the record.

sized its view that all three cases were disposed of together (T. 119) in spite of the petitioner's motion to separate the cases. (T. 13-15)

On March 22, 1968, a further hearing was held at which time the petitioner's present counsel argued against the inclusion of the banishment provision in the sentence. (T. 136, 140, 141) During this appearance it became apparent again that the court was still trying to consider other cases in conjunction with the instant case over the strenuous objection of counsel. (T. 145) The court became increasingly irritated with the petitioner's position and stated its intention to revoke its previous suspension of four months of the six months sentence. (T. 146, 147, 148)

The petitioner's counsel then argued the invalidity of the initial warrant (T. 151) with reference to constitutional provisions. (T. 153) The court then revoked the suspension for no reason other than the petitioner's declared intention to appeal the sentence. (T. 157)

Finally, in the face of a Virginia statutory provision requiring that a misdemeanant be let to bail (§19.1-281 of the Code of Virginia of 1950) and over vigorous argument of counsel, the petitioner was sent to jail without being allowed to give bail. (T. 169-174) Again it is apparent that the only motivation for the court's action is the petitioner's indicated intention to appeal his conviction.

On March 25, 1968, a final hearing was held at which time the court fixed the petitioner's bail at $2500.00.

In compliance with Rule 5:1 § (3(e) of the Rules of the Supreme Court of Appeals of Virginia, transcripts of the record were signed and certified by counsel, signed by the court and filed in the Clerk's Office of the Circuit Court of Prince Edward County, Virginia, on April 22, 1968.

In compliance with Rule 5:1 § 4 of the Rules, notice of appeal and assignments of error were filed in said Clerk's Office on April 27, 1968, and an additional assignment of error was filed on June 7, 1968. Among the assignments of error are references to the illegal arrest under the improper warrant; the banishment provision of the suspension of the sentence; and the prejudicial change of the petitioner's sentence by the court, prompted solely by the petitioner's stated intention to appeal.

In compliance with Rule 5:1 § 6 of said Rules, counsel for petitioner designated parts of the record to be printed on June 7, 1968, if a writ of error were to be granted by the Supreme Court of Appeals of Virginia. In compliance with § 8-475 and § 8-463 of the Virginia Code, and Rules 5:3 and 5:4 of the Rules of the Supreme Court of Appeals of Virginia rejected the petition for a writ of error and aferror were filed in the Supreme Court of Appeals of Virginia at Richmond as required.

On October 16, 1968, the Supreme Court of Appeals of Virginia rejected the petition for a writ of error and affirmed the judgment of the lower court, the effect of which under the provisions of § 8-476 of the Virginia Code was a final judgment upholding the conviction of the petitioner.

On December 2, 1968, an order was entered committing the petitioner to jail in spite of counsel's declared intention to prosecute an appeal to the Supreme Court of the United States. On December 6, 1968, the Supreme Court of Appeals of Virginia entered an order staying the execution of the judgment pending an appeal to the Supreme Court of the United States. In spite of the entry of this order, on December 9, 1968, the Circuit Court of Prince Edward County refused to allow the petitioner to go free on bail

pending his appeal to the Supreme Court of the United States and it was not until December 16, 1968, that the court finally authorize the release of the petitioner.

(B) Statement of Material Facts

The only facts material to this petition relate to the validity of the warrant, question number three presented. The other two questions have been set forth in the statement of the material proceedings in the lower courts.

The facts relevant to the validity of the warrant are as follows:

Sometime after four o'clock on the afternoon of March 11, 1967, a Mrs. Mary Finchum swore out a warrant* against her husband at the Farmville, Virginia Police Station. (T. 20) The address was given as 208 South Virginia Street, Farmville, Virginia (T. 22) Officer George Crowder contacted Officers Kelsey and Rickmond of the Farmville Police and asked them to make the arrest based upon the warrant. (T. 24) Officer Crowder did not know Mrs. Mary Finchum and did not know who her husband was. (T. 25, 26) Officers Kelsey and Rickmond went to serve the warrant and found John Raymond Finchum, Sr. at home. (T. 33) A young boy opened the door, whose name was determined later to be John Raymond Finchum, Jr. (T. 33) Officer Kelsey read the warrant to the petitioner to which the petitioner replied, "That's not me, that could be my boy there." (T. 34) Officers Kelsey and Rickmond talked to the petitioner for a little while and then picked him up and started to carry him out the door. The petitioner was scuffling and shoving them away from him. He fell on a cot and claimed to have burned himself with a cigarette. (T. 34) John Raymond Finchum, Jr. got a rifle and held it on

* original warrant reads "John Finchum"

the officers and the petitioner agreed that if the officers would get a proper warrant for him he would go with them. (T. 34-38) The community generally considers John Raymond Finchum, Sr. as "Raymond Finchum". (T. 40) They do not call him "John". (T. 40) No return was ever made on the original warrant. (T. 41) The petitioner never struck the officers. (T. 43) He was just pulling and did not want to go. (T. 44) Officer Kelsey weighed 230 pounds and was six feet two inches tall. (T. 48) Officer Rickmond testified that the petitioner did not strike him or hit him or kick him or harm him in any way. (T. 55) There are four John Finchums in the Farmville, Virginia area. (T. 66)

(C) Federal Questions Raised

The federal questions were raised in the lower courts as follows:

1. **Banishment**

"Mr. Edmunds: If it please the court, then I'd like to get to the first point which would be the question of whether or not the language of sending the defendant outside the state should be included in those judgments. The general law is stated in 21 Am. Jur. 2d § 609. This says: "A sentence of banishment or deportation may be imposed in foreign countries, and deportation is a conventional method of punishing undesirable aliens who commit in the United States." And that means aliens to the United States, of course, "but a sentence banishing from the jurisdiction a person convicted of crime is generally held to be considered cruel and unusual punishment. It is impliedly prohibited by public policy. Likewise,"—this is the important part,—"Likewise, the suspension or reduction of a sentence on condition that a

convicted person leave the state or country if (sic) void." (T. 140, 141)

* * *

From assignments of error:

"5. The court should not have inserted as a condition of the suspension of a portion of the sentence imposed on February 29, 1968, the condition that the defendant leave the Commonwealth of Virginia for a period of five (5) years subsequent to his release from jail."

2. **Impeding Appeal**

Letter dated March 29, 1968, from James T. Edmunds counsel for the petitioner, page 4:

"Thus, the ultimate question is whether the court wishes to revoke its suspension on the ground that the defendant desires to appeal a case which he has previously told the court, through his counsel, that he will not appeal. I submit that it would put the court in an untenable position to take such severe action against a criminal defendant for pursuing his rights of appeal. It is a part of the whole concept of due process that a criminal defendant shall have the right should he so desire to have the trial court's action reviewed by an appellate court. Any action by the court to impede, dissuade, disallow or discourage the defendant in the enjoyment of this right would be bad public policy." Letter of argument to Prince Edward Circuit Court

* * *

From assignments of error:

"8. That the Court erred in changing the terms of the sentence of February 29, 1968, to the prejudice of the de-

fendant as to the suspension of a portion of the sentence imposed by the jury."

* * *

From petition for writ of error, page 14:

"It is a part of the whole concept of due process that the criminal defendant shall have the right, should he so desire, to have the trial court's action reviewed by an appellate court."

3. **Improper Warrant**

T. 153 "It is essential to validity of warrant that the person to be arrested be identified by its terms, and the warrant does not authorize arrest unless the person to be arrested is sufficiently named or otherwise described in the warrant." And prior to that they cite the constitutional law provisions which are the basis for this protection."

* * *

From the assignments of error:

"2. The Commonwealth failed to prove beyond a reasonable doubt that the officers ever had a proper warrant charging the defendant with any crime when they first attempted to execute a warrant on the defendant and placed him under arrest; and that without such a warrant, the defendant is not guilty of the charge for which he was tried and convicted in this court because the officers were attempting an illegal and false arrest in violation of the defendant's constitutional rights."

* * *

Form the petition for writ of error, page 10:

"The Fourth Amendment to the Constitution provides that ". . . no warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, *or the person or thing to be seized.*" (Emphasis added)"

ARGUMENT

I. The court cannot punish or impede a petitioner in his effort to appeal a conviction in violation of the petitioner's right of due process guaranteed by the Fifth Amendment. This question has been fully covered in the previous discussion and it is apparent from reading the full transcript that the court considered that the petitioner had broken faith with the court in appealing this conviction. Goaded by this belief, the court threatened to reopen two companion cases; actually revoked the suspension of a portion of the petitioner's sentence; refused to allow him to bail on March 22, 1968; and refused to release him from jail on December 9, 1968, all of which has been previously presented.

II. The court's inclusion in its sentencing order of a provision for banishment is illegal as unusual punishment under the Eighth Amendment.

The Virginia court iself recognizes that the purpose of the suspension of sentences is to secure the rehabilitation of the offender. The imposition of such an unreasonable condition for the suspension of a portion of the sentence voids the original sentence. *Loving vs. Commonwealth,* 206 Va. 924, 147 SE 2d 78 (1966)

The suspension of judgment on condition that the petitioner leave and remain away from the county is void.

> "A sentence banishing from the state a person convicted of crime is impliedly prohibited by public policy as tending to incite dissension among states, provoke retaliation and disturb that fundamental equality of political rights among the several states which is the basis of the Union." *People vs. Baum,* 251 Mich. 187, 231 NW 95 (1930)

III. The petitioner should not be convicted on a warrant that does not properly name him in violation of his rights under the Fourth Amendment.

A warrant for the arrest of a named person will not justify arrests of another who merely has the same surname. *West vs. Cabell,* 153 US 78, 38 L ed 643, 14 S Ct 752

A warrant giving only the surname and stating that the Christian name is unknown is not sufficient where prosecution is for resisting arrest and state has the burden to show a valid warrant. *Graham vs. State,* 29 Tex App 31, 13 SW 1013

In the opinion in *West vs. Cabell,* supra, the Supreme Court of the United States uses this language:

> "By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment . . ."

CONCLUSION

The violation of even the minimum protection of the petitioner's rights in both the procedural and substantive areas and the peculiar attitude exhibited by the court toward the petitioner's desire to appeal are tendencies that could rapidly multiply unless relief can be obtained in this court.

WHEREFORE, your petitioner respectfully prays that the final judgment of the Supreme Court of Appeals of Virginia upholding the conviction of your petitioner be reversed and the case be remanded to that court with directions to remand to the Circuit Court of Prince Edward County, Virginia, for a new trial.

Respectfully submitted,

JOHN RAYMOND FINCHUM, SR.

By .....
James T. Edmunds, counsel

Counsel for petitioner
JAMES T. EDMUNDS
Attorney at Law
515 Broad Street
Kenbridge, Virginia 23944

APPENDIX A

The following is the final order by the Supreme Court of Appeals of Virginia upholding the conviction of the petitioner in the Circuit Court of Prince Edward County, Virginia:

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

The petition of John Raymond Finchum, Sr., for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Prince Edward County on the 22nd day of March, 1968, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,
Teste: Howard G. Turner, Clerk
By R. P. Tomlinson
Deputy Clerk

MAR 21 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 944

JOHN RAYMOND FINCHUM, SR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONSE TO PETITION FOR CERTIORARI

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Commonwealth Attorney
Prince Edward County
Court House Building
Farmville, Virginia
Counsel for Respondent

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To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

OPINIONS IN COURTS BELOW

There are no written opinions in the courts below.

GROUNDS OF JURISDICTION

The judgment sought to be reviewed is a final judgment by the Supreme Court of Appeals of Virginia, dated and entered on the 16th day of October, 1968, which affirmed a conviction of the petitioner for a misdemeanor in the Circuit Court of Prince Edward County pursuant to trial by

jury de novo after appeal from conviction in the County Court of Prince Edward County on April 7, 1967.

The petitioner seeks reversal of the final judgment of the Virginia Supreme Court of Appeals on the grounds that the Supreme Court of Appeals should have reversed the conviction of the petitioner because the petitioner's constitutional rights guaranteed by the Eighth Amendment, the Fourth and Fifth Amendments have not been protected in the trial, to his prejudice. The petitioner further asserts that the violation of the constitutionally protected rights were claimed in the courts below and are re-asserted here and that this Court has jurisdiction under the statutory provisions of 28 U.S.C., Section 1257, and that this Court has jurisdiction to review a final judgment of the Virginia Supreme Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

1. Can a court punish or impede a petitioner in his effort to appeal a conviction in violation of petitioner's right of due process guaranteed by the Fifth Amendment?

2. Can a court include in its sentencing order a provision for banishment in violation of the petitioner's right of protection against cruel and unusual punishment under the Eighth Amendment?

3. Can a petitioner be convicted on a warrant that does not properly name him in violation of his right to protection against an improper seizure under the Fourth Amendment?

CONSTITUTIONAL PROVISIONS

Petitioner relies upon the Fourth, Fifth and Eighth Amendments to the United States Constitution which are set forth below in their entirety:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U. S. Const. Amend. IV

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U. S. Const. Amend. V

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U. S. Const. Amend. VIII"

STATEMENT OF THE CASE

(A) Material Proceedings in the Lower Courts

On April 7, 1967, petitioner was convicted of unlawfully resisting arrest on March 11, 1967, by the County Court of Prince Edward County and was sentenced to serve twelve months in jail and fined $100.00. Ten months was suspended on good behavior of the petitioner for three years. An appeal was noted by the petitioner to the Circuit Court of Prince Edward County.

On January 17, 1968, a jury trial was held in the Circuit Court of Prince Edward County on an amended warrant charging the petitioner with obstructing justice with threats and force. The petitioner was found guilty as

charged and the jury fixed his sentence at six months' suspended sentence and a fine. The jury was then instructed by the Court to return and reconsider its verdict as only the Court could suspend the sentence. The jury reconsidered its verdict and returned, eliminating the suspension of the jail sentence (T. 89).

Defense counsel moved to set aside the verdict and the Court set a date for argument on the motion (T. 95). Counsel for the petitioner, William C. Carter, filed a written motion to set aside the verdict, one of the grounds being that the original warrant to be served was improper since the defendant was not properly named (R. 16).

On February 29, 1968, the Court reconvened to hear motion to set aside the verdict, but instead the petitioner's counsel withdrew the motion (T. 94), the Court requested a recommendation from the Commonwealth's Attorney and the Commonwealth's Attorney recommended that four months of the six months' sentence imposed by the jury be suspended for a period of five years, upon the good behavior of the petitioner and upon the further condition that the petitioner remove himself to the State of Florida for a period of five years, he being a non-resident of the State of Virginia (T. 95-96). On this date the petitioner requested that he be given sufficient time to put his affairs in order before going to jail and the execution of the sentence was postponed until March 11, 1968.

On March 11, 1968, petitioner again appeared in Court and stated to the Court that he might wish to note an appeal to the Supreme Court of Virginia. Mr. William C. Carter, his attorney, stated to the Court that he had not advocated the appeal and made a motion to be allowed to withdraw as counsel from the case (T. 106). On that date the motion of Mr. Carter to be allowed to withdraw was granted and the case was continued to March 18, 1968, to allow the peti-

tioner to secure other counsel and to determine whether or not an appeal would be granted.

The case was again continued until March 22, 1968, at which time present counsel for the petitioner appeared, moved to remove the part of the suspended sentence requiring the petitioner to leave the state for five years and moved to set aside the verdict because of the improper naming of the petitioner on the warrant. The Court removed that portion of the sentence requiring the petitioner to remain outside of the state for five years and imposed the sentence as set by the jury, to-wit: sentence the petitioner to serve six months in jail (T. 148). The Court overruled the motion as to the validity of the warrant and held that it was proper (T. 162-163). The Court then committed the petitioner tc jail and continued the case until March 25, 1968, for the fixing of bond.

On March 25, 1968, again appeared the petitioner and attorney for the petitioner and moved the Court to set a bond. The Court set the bond at $2500.00 and petitioner was released from jail (T. 180).

In compliance with Rule 5:1, Section 3(e) of the Rules of the Supreme Court of Appeals of Virginia, transcripts of the record were signed and certified by counsel, signed by the Court and filed in the Clerk's Office of the Circuit Court of Prince Edward County, Virginia, on April 22, 1968.

In compliance with Rule 5:1, Section 4, notice of appeal and assignments of error were filed in the Clerk's Office of Prince Edward County on April 27, 1968, and additional assignments of error were filed on June 7, 1968. Amongst the assignments of error are the references to the illegal arrest under the improper warrant and the banishment provision of the suspension of the sentence. The petitioner filed a

petition for a writ of error to the Virginia Supreme Court of Appeals according to the rules and on October 16, 1968, the petition for writ of error was refused and the sentence of the Lower Court was confirmed. (See Appendix A) No steps were taken by the petitioner or his attorney to secure a stay of execution by the Supreme Court of Appeals of Virginia and on December 2, 1968, an order was entered by the Circuit Court of Prince Edward County committing the petitioner to jail and he was committed to jail. On December 6, 1968, the Virginia Supreme Court of Appeals entered an order staying the execution, but providing "the above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond, if out on bail." (See Appendix B) After some investigation by counsel for the petitioner, the Court and Commonwealth's Attorney, on December 16, 1968, the Court authorized the release of the petitioner on bail.

(B) Statement of Material Facts

Facts material to this petition as to the validity of the warrant presented as in petitioner's brief, and as stated the other two questions have been set forth in the statement of material proceedings in the lower courts.

The facts relevant to the validity of the warrant are as follows:

Sometime around Four O'Clock in the afternon of March 11, 1967, a Mrs. Mary Finchum came to the police station in the Town of Farmville, after talking to Officer George Crowder and identifying herself as Mrs. Mary Finchum, swore out a warrant against her husband, John Finchum, giving the address as 208 South Virginia Street, Farmville, Virginia (T. 20). Officer Crowder, who was not on duty, contacted Officers Kelsey and Rickman of the Farmville

Police Department and asked them to make the arrest based upon the warrant (T. 24-25). Officer Crowder did not recognize Mrs. Finchum when she first came in to swear out the warrant, but did recognize her upon being advised by her of her name (T. 26). Officer Crowder advised Officers Kelsey and Rickman that a warrant had been sworn out by Mrs. Finchum for her husband, John Finchum, to be served at the address shown on the warrant, being 208 South Virginia Street, Farmville, Virginia. Officer Kelsey stated that he came to the police station and saw Officer Crowder, who gave him the warrant against Finchum (T. 29); that he saw Mrs. Mary Finchum there; that he had known Mrs. Mary Finchum and Mr. John Finchum for a period of approximately fifteen years, being members of his church (T. 30). He knew their names also by keeping the records of the church as Clerk of the Session (T. 30). He also inquired of Officer Crowder as to the name of the person on whom the warrant was issued and was advised that it was John Raymond Finchum (T. 31). Officers Kelsey and Rickman went to serve the warrant at 208 South Virginia Street, saw John Raymond Finchum in the house (T. 33). A young boy, fourteen years of age, who was later identified as John Raymond Finchum, Jr., opened the door for them (T. 33). Officer Kelsey entered the house with Officer Rickman and read the warrant to the petitioner and the petitioner replied, "That's not me, that could be my boy there" (T. 33). John Finchum had had some domestic difficulty with his wife prior to the serving of the warrant charging him with making an assault on his wife (T. 70). His son was not present in the home at the time that this domestic difficulty and assault occurred (T. 70). His wife's name is Mary Loretta Finchum, the only John Finchum residing at 208 South Virginia Street were John Finchum, Sr. and John Finchum, Jr., a fourteen year old boy (T. 71).

The petitioner, John Finchum, knew that Officers Kelsey and Rickman were police officers of the Town of Farmville and also stated that they (Officers Kelsey and Rickman) knew who he was (T. 75). Officers Kelsey and Rickman talked to the petitioner for a little while, then after asking him to go with them, he refusing, they picked him up and started carrying him out of the door (T. 34). At the door the petitioner's son told the police officers, "Don't hurt my daddy." The petitioner then told his son, "Get the gun, get the gun." The son went into a back room and returned with a carbine rifle (T. 35-36). The gun had a clip in it and it is unknown whether it was loaded or not. The officers released John Finchum, who went back into another room and sat down. The officers then told Mr. Finchum they would have to arrest him and he would have to go with them. Mr. Finchum advised, "If you go and get the warrant with my name on it I will go with you" (T. 38). In order not to cause serious difficulty and injure the petitioner and his son, the officers returned to the police station, secured a warrant with the name of John Raymond Finchum, Sr. thereon (T. 39), returned and after some difficulty completed the arrest.

SUMMARY OF ARGUMENT

The Commonwealth of Virginia will show that the question of banishment raised by the petitioner is moot and further that even should the portion of the suspension order as to banishment be void, it would not effect the validity of the sentence imposed by the Court which was based upon the jury verdict. As to the restriction of the petitioner's right to appeal as contended in the brief, the Commonwealth would state that in fact the petitioner's rights were not prejudiced, that he was not prevented from perfecting his appeal, and

was in fact assisted in this appeal. The Commonwealth would further present that the warrant originally issued was a proper warrant and the arrest of the petitioner was proper.

1. Banishment

No sentence of or condition of suspension as to banishment attached to the petitioner's sentence exist and can not be heard before this Court. The order of the Court sentencing the petitioner and suspending a portion of the sentence conditioned on the fact the petitioner leave the Commonwealth of Virginia for a period of five years subsequent to his release from jail as set forth in the sentence of the Court of February 29, 1968, was charged by the Court on March 22, 1968. The Court on that date removed the portion of the order requiring banishment and imposed the sentence as set by the jury of six months in jail, without any portion thereof being suspended (T. 38).

It is further presented that even though the question is not moot and can be heard by the Court, the fact that the probation order is void as to banishment does not render the conviction and judgment void. The petitioner is still required to serve the sentence as imposed by the Court. *Vicker* v. *Lady*, ... Ky. ....., 264 S.W. 2nd 683.

2. Impeding Appeal

There is no basis for the allegation that the Court attempted in any way to impede or prevent the petitioner from perfecting his appeal to the Supreme Court. To the contrary, the Court did all it could to assist the petitioner in this regard. Trial before jury was held January 17, 1968, and the Court on motion of counsel continued the case without imposition of sentence until February 29, 1968. On

February 29, 1968, the motion to set aside the verdict was withdrawn and the petitioner was sentenced, but imposition of sentence was postponed to give the petitioner time to get his affairs in order. The petitioner was directed to appear on March 11, 1968, to submit himself to the sheriff for incarceration. On March 11, 1968, the petitioner indicated he might wish to appeal. His attorney stated to the Court that he had explained everything to Mr. Finchum and had recommended against an appeal. Mr. Carter then asked to be allowed to withdraw. The petitioner was then directed to secure counsel on the question of appeal and advise the Court by March 18, 1968. New counsel did not appear until March 22, 1968, at which time he renewed the petitioner's motion to set aside the verdict on the question of banishment and on the question that bond was denied on the original arrest (T. 140) (this point being raised for the first time at this point). The petitioner indicated he might appeal and moved the court to release him on bond. The Court took the motion to fix bond under advisement until March 25, 1968, at which time the Court granted the motion to fix bond and set bond at $2500.00.

As to the refusal of the Court to release the petitioner from jail on December 6, 1968, again petitioner and his counsel, well knowing the judgment of the Supreme Court of Appeals under order entered October 16, 1968, took no steps to stay the Supreme Court of Appeals' order until the petitioner was directed to appear on December 6, 1968, to begin serving his sentence. The order directing the incarceration was in no way detrimental to his filing a petition for writ of certiorari. All of the record indicates that the petitioner was trifling with the Court, that he was a non-resident of Virginia and after sentence the Court was concerned he would leave the state, yet at all times the Court and the

Attorney for the Commonwealth did all in their power to protect the constitutional rights of the petitioner.

In addition to the above, it should be noted that in fact the petitioner did file his petition for writ of error to the Virginia Supreme Court of Appeals and did file his petition for writ of certiorari to this Court.

3. Improper Warrant

The only grounds alleged by the petitioner as to the invalidity of the warrant was the fact that the warrant was issued against "John Finchum," instead of "John Raymond Finchum, Sr." There is no allegation on the part of the petitioner that someone else had made an assault on his wife, Mary Finchum; that he did not reside at 208 South Virginia Street in the Town of Farmville or that he was not the person on whom the warrant was issued. His only objection was that the warrant could have been issued against his son, John Finchum, Jr. (T. 33). This Court has decided that the insertion or omission of a middle name or initial is immaterial and may be disregarded on a warrant. *Keene* v. *Meade,* 28 U.S. 1, 3 Pet 1, 78 Lawyers Addition 581. This Court has further determined that where the petitioner's name was W. J. Foust while he was indicted as W. J. Faust does not constitute a material variance. *Foust* v. *U.S.,* 16 Sup. Ct. 1112, 163 U.S. 452, 44 L. Ed. 224.

CONCLUSION

For the reasons stated above, the Commonwealth of Virginia contends that the petitioner's rights have not been violated as to procedural or substantive matters. The Commonwealth would further contend that there are no federal questions of substance decided by the Virginia Supreme Court of Appeals, which have not heretofore been determined by this Court, nor have any of these questions been decided by the Supreme Court of Appeals of Virginia in a way not in accord with the applicable decisions of this Court.

WHEREFORE, your respondent respectfully prays that the petition for writ of certiorari to final judgment of the Supreme Court of Appeals of Virginia upholding the conviction of the petitioner be refused, the final judgment of the Supreme Court of Appeals of Virginia and of the Circuit Court of Prince Edward County be sustained.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By William F. Watkins, Jr.
Counsel

WILLIAM F. WATKINS, JR.
Commonwealth's Attorney
Prince Edward County
Court House Building
Farmville, Virginia 23901
Counsel for Respondent

APPENDIX A

The following is the final order by the Supreme Court of Appeals of Virginia upholding the conviction of the petitioner in the Circuit Court of Prince Edward County, Virginia:

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.

The petition of John Raymond Finchum, Sr., for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Prince Edward County on the 22nd day of March, 1968, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,
Teste: Howard G. Turner, Clerk
By R. P. Tomlinson
Deputy Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of December, 1968.

John Raymond Finchum, Sr.,
Plaintiff in error,

against

Commonwealth of Virginia,
Defendant in error.

Order Staying Execution of Judgment

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on October 16, 1968, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on October 16, 1968, be, and the same is hereby, stayed, until the 14th day of January, 1969, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,
Teste: H. G. Turner
Clerk